IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-444

PENN CENTRAL TRANSPORTATION CO., *et al.*,

Appellants,

v.

THE CITY OF NEW YORK, *et al.*,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION FOR LEAVE TO FILE AND BRIEF OF THE NATIONAL TRUST FOR HISTORIC PRESERVATION, CITY OF NEW ORLEANS, CITY OF BOSTON, CITY OF SAN ANTONIO, NATIONAL CONFERENCE OF STATE HISTORIC PRESERVATION OFFICERS, DON'T TEAR IT DOWN, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, NATIONAL LEAGUE OF CITIES AND SIERRA CLUB AS AMICI CURIAE IN SUPPORT OF APPELLEES

DAVID BONDERMAN
ROBERT A. GARRETT
ARNOLD & PORTER
1229 Nineteenth Street, N.W.
Washington, D.C. 20036
Attorneys for Amici Curiae

Of Counsel:

FRANK B. GILBERT
STEPHEN N. DENNIS
GREGORY E. ANDREWS
740-48 Jackson Place, N.W.
Washington, D.C. 20006

March, 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-444

PENN CENTRAL TRANSPORTATION CO., *et al.*,

Appellants,

v.

THE CITY OF NEW YORK, *et al.*,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION FOR LEAVE TO FILE BRIEF ON BEHALF OF THE NATIONAL TRUST FOR HISTORIC PRESERVATION, CITY OF NEW ORLEANS, CITY OF BOSTON, CITY OF SAN ANTONIO, NATIONAL CONFERENCE OF STATE HISTORIC PRESERVATION OFFICERS, DON'T TEAR IT DOWN, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, NATIONAL LEAGUE OF CITIES AND SIERRA CLUB AS AMICI CURIAE IN SUPPORT OF APPELLEES

Pursuant to Supreme Court Rule 42(3), the National Trust for Historic Preservation, City of New Orleans, City of Boston, City of San Antonio, National Conference of State Historic Preservation Officers, Don't Tear It Down, National Institute of Municipal Law Officers, National League of Cities and Sierra Club hereby respectfully move for leave to file the attached brief as amici curiae in support of appellees. Counsel for appellees have consented to the filing of this brief. Counsel for appellants have not consented.

The interests of Amici are as follows:

1. *The National Trust for Historic Preservation* is the leading national organization in the field of historic preservation. It was chartered by Congress in 1949 as a "charitable, educational, and nonprofit" corporation "to facilitate public participation in the preservation of sites, buildings, and objects of national significance or interest," and to preserve and administer historical properties significant in American history and culture for the public benefit. 16 U.S.C. § 468. The National Trust has more than 121,000 contributing members, including approximately 1,500 member organizations involved in local and regional historic preservation activities. In addition to owning and maintaining historic properties, the National Trust furthers historic preservation through extensive advisory and educational services. It has worked closely with many of the 500 municipalities which have enacted landmark and historic district ordinances.

2-4. *Cities of New Orleans, Boston and San Antonio.* Numerous individual landmarks and several districts of historic and architectural importance are located within these cities. To protect its distinctive character, each city has instituted historic preservation programs comparable to that of the City of New York. New Orleans, for example, has had a municipal historic preservation program since 1936, when the Vieux Carre Commission was created to protect the French Quarter. And in 1975 New Orleans established the Historic District/Landmarks Commission, with the power to designate landmarks and historic districts in the remainder of the City. The Massachusetts Legislature has declared two areas within Boston, Beacon Hill and the Back Bay, to be historic districts, and has recently established the Boston Landmarks Commission with the power

to designate landmarks and landmark districts. In 1967 the City of San Antonio enacted an ordinance providing for the designation of historic property and the creation of a Board of Review for historic districts and landmarks. And in 1974 it established an Office for Historic Preservation that helps ensure that city programs and expenditures aid historic preservation activities.

5. *National Conference of State Historic Preservation Officers* is an association which facilitates the administration of State and Federal programs for the preservation of America's historic, architectural and cultural heritage. The National Conference membership consists of the officially designated State Historic Preservation Officer in each of the fifty states, the District of Columbia and five territories. Among the responsibilities of these officers are: the compilation of statewide surveys of historic resources including districts, sites, buildings, structures and objects significant in American history, architecture, archeology and culture; nominations of inventoried properties to the National Register of Historic Places; and the administration of the National Historic Preservation Act grants-in-aid program which makes Federal funds available to private groups, individuals and local governments for the preservation, stabilization, rehabilitation and restoration of buildings, sites, structures and objects.

6. *Don't Tear It Down* is a non-profit membership organization in the City of Washington dedicated to preserving those features of the built environment which have made the capital one of the most beautiful urban areas in the world and a pleasant city in which to live and work. Don't Tear It Down has played a central role in preserving and revitalizing the Old Post Office, the Willard Hotel and other well-known Washington landmarks, and in encour-

aging continued use and adaptive reuse of older buildings and structures.

7. *National Institute of Municipal Law Officers* (NIMLO), a non-profit organization established in 1935, is composed of and funded by over 1,400 municipal corporations and government units in all of the fifty states, the District of Columbia and Puerto Rico. Member municipalities participate in the organization through their approximately 6,000 chief legal officers, who have authored or enforced many of the 500 landmark and historic district ordinances that have been enacted nationwide. As Americans have developed an increasing awareness and appreciation of the historic and architectural heritage that surrounds them, they have turned for assistance in preserving these historic landmarks and districts to municipal government, the entity with the greatest stake in maintaining the quality of local life.

8. *National League of Cities* (NLC) represents more than 700 municipalities directly and over 15,000 cities indirectly through state municipal leagues. Known until 1964 as the American Municipal Association, the League was founded in 1924 by and for reform-minded state municipal leagues. The 27 United States cities with populations greater than 500,000 are all NLC direct members. In recent years considerable emphasis has been placed on revitalization of municipalities that have experienced deterioration and blight. While many tools are needed to accomplish this goal, one of the most important has been historic preservation. The League has been especially concerned with ensuring the right of municipalities to protect the well-being of their citizens through historic preservation.

9. *Sierra Club,* a non-profit corporation, is an international environmental and conservation organization with approximately 180,000 members in the United States. A

purpose of the Sierra Club is "To enhance and protect by all lawful means the natural resources and human environment of the United States and the earth in general." This includes not only the natural environment, but the urban environment as well. The Sierra Club has recently reaffirmed its commitment to protecting for present and future generations a safe, healthy and congenial urban environment in which to live. Historic landmarks are an integral and inseparable part of this urban environment.

Amici have examined the issues presented in this case from a national perspective. They believe that historic preservation is vital to the welfare of this Nation and that the decision in this case will have a significant impact on the future of historic preservation generally and their programs specifically. Amici are particularly concerned because the briefs filed in this case have presupposed that land use regulations for purposes of historic preservation are different from, and less justifiable than, other land use regulations, such as zoning; concentrating solely on questions of compensation, they have therefore ignored the traditional tests which this Court has consistently applied in evaluating land use restrictions. Accordingly, Amici request that this Court grant leave to file the attached brief.

Respectfully submitted,

David Bonderman
Robert A. Garrett
Attorneys for Amici Curiae

Of Counsel:

Frank B. Gilbert
Stephen N. Dennis
Gregory E. Andrews

TABLE OF CONTENTS

Table of Authorities

STATUTES:

Federal

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-444

PENN CENTRAL TRANSPORTATION CO., *et al.*,

Appellants,

v.

THE CITY OF NEW YORK, *et al.*,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF THE NATIONAL TRUST FOR HISTORIC PRESERVATION, CITY OF NEW ORLEANS, CITY OF BOSTON, CITY OF SAN ANTONIO, NATIONAL CONFERENCE OF STATE HISTORIC PRESERVATION OFFICERS, DON'T TEAR IT DOWN, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, NATIONAL LEAGUE OF CITIES AND SIERRA CLUB AS AMICI CURIAE IN SUPPORT OF APPELLEES

Statutes Involved

The relevant portions of the New York City Landmarks Preservation Law (N.Y.C. Charter & Admin. Code, ch. 8-A) and Zoning Resolutions are reprinted in the Appendix to the Jurisdictional Statement. (J.S. App. 76a-118a)[1]

---

[1] References to the Appendix filed with the Jurisdictional Statement are designated as "J.S. App." References to the Appendix are designated as "App."

When the New York City Council enacted this law, it determined that

> "the protection, enhancement, perpetuation and use of improvements and landscape features of special character or special historical or aesthetic interest or value is a public necessity and is required in the interest of the health, prosperity, safety and welfare of the people." N.Y.C. Administrative Code § 205-1.0b. (J.S. App. 76a)

Specifically, the Council concluded that landmark preservation is necessary to safeguard the city's historic, aesthetic and cultural heritage, to protect and to enhance the city's attractions to tourists, and to strengthen the city's economy. N.Y.C. Administrative Code § 205-1.0b. (J.S. App. 76a-77a)

The City of New York established a statutory plan pursuant to which its Landmarks Preservation Commission is empowered, after a public hearing, to designate qualifying structures of significant historic or aesthetic merit as landmarks. N.Y.C. Administrative Code § 207-2.0. (J.S. App. 84a-87a) Once such a designation has been considered by the City Planning Commission and approved by the Board of Estimate, construction, reconstruction, alteration and demolition are regulated by the Landmarks Preservation Commission. A proposed modification of a landmark will not be allowed unless the Commission finds that it will have no effect on the protected architectural features, is otherwise consistent with the purposes of the landmarks law, or is required to avoid economic hardship to the owner. N.Y.C. Administrative Code §§ 207-4.0 to -9.0. (J.S. App. 88a-104a)

Questions Presented

1. Whether the regulation of land use for purposes of historic preservation is a permissible exercise of the state's police power, in the same manner as zoning and other urban land use regulations?

2. Whether the regulation of individual landmarks, as part of a general plan to protect and enhance such structures, is discriminatory and therefore violative of the Fourteenth Amendment?

3. Whether a limitation on the use of air rights pursuant to a historic preservation regulation is a "taking" for which compensation must be paid, even though it is conceded that the landowner can obtain a reasonable return on its investment without the use of the air rights?

Statement

In recent years, historic preservation—the protection, rehabilitation and reuse of older buildings whose aesthetic or historic merit significantly contributes to the American landscape and culture, and to the maintenance of American cities and towns as livable places—has become a matter of great public interest and concern.[2] Congress, for example, has established a National Register of Historic Places and has specifically determined that

---

[2] "Organizations active in historic preservation work have more than doubled since 1966, growing from fewer than 2,500 to more than 6,000 as of June, 1975." Biddle, *Historic Preservation: The Citizens Quiet Revolution*, 8 Conn. L. Rev. 202 (1976). There are currently over 500 municipal commissions with responsibility for historic preservation. *See* National Trust for Historic Preservation, Directory of Landmark and Historic District Commissions (1976).

"the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people." National Historic Preservation Act of 1966, 16 U.S.C. § 470(b).[3]

Similarly, all fifty states and over five hundred municipalities have enacted statutes and ordinances in one form or another, as part of land use regulations, to encourage or require the preservation and maintenance of historic places.[4]

The New York City ordinance at issue in this case is simply one example of the now-widespread movement to protect landmarks as part of land use legislation. And the Grand Central Terminal, the subject of this litigation, is but one of approximately 500 individual sites and 31 districts designated by the New York City Landmarks Preservation Commission pursuant to the city's general plan to preserve sites of special historic or aesthetic merit.[5]

The Grand Central Terminal itself was built after a nationwide competition to design a replacement for Cornelius Vanderbilt's 1871 Grand Central Depot. Pursuant to a special grant from the city, the Terminal was built in the middle of Park Avenue, a city street. The Terminal was opened to the public in 1913 and immediately attracted international acclaim, not only because of the imaginative architectural solution to the difficult engineering problem posed by having to construct the station over underground tracks, but because of the architectural design and scale of the building, and its fine Beaux Arts facade, attractive

[3] *See also* notes 25-27 *infra* and accompanying text.

[4] *See* note 24 *infra*.

[5] Landmarks Preservation Commission of the City of New York, Landmarks and Historic Districts (1977).

sculptured details and imposing statues of Mercury, Hercules and Minerva atop the Forty-Second Street facade.[6] Indeed, as the New York Supreme Court, Appellate Division, found in this case:

"Grand Central Terminal is an important and irreplaceable component of the special uniqueness of New York City. It is unquestionably one of New York City's best known buildings. Along with the Empire State Building and the Statue of Liberty, the image of its facade symbolizes New York City for millions of visitors and residents." (J.S. App. 47a)

On August 2, 1967, pursuant to the landmarks law and after several public hearings, the New York City Landmarks Preservation Commission designated the Grand Central Terminal as both a landmark and a landmark site. (R 2240-41) The Commission's designation of the Terminal and the confirmation on September 21, 1967 of that designation by the New York City Board of Estimate were never challenged and are not at issue here.

On January 22, 1968, well after the designation of the Terminal as a landmark, the Penn Central Transportation Company, certain of its subsidiaries and UGP Properties, Inc., appellants in this case,[7] entered into a lease and sublease arrangement for the purpose of constructing a 56-story office building atop the Terminal. In accordance with the landmarks law, Penn Central submitted to the Landmarks Preservation Commission several designs for the office tower, one of which would have preserved the Terminal's facade underneath the 56-story tower and two others which would have demolished the facade. After a

[6] Photographs of the Terminal appear at pages 2232, 2234, 2236 and 2238 of the Record on Appeal to the New York Court of Appeals (hereinafter "R").

[7] Appellants are sometimes jointly referred to as "Penn Central."

hearing, the Landmarks Preservation Commission concluded that the proposed office tower would not be appropriate to, or consistent with, the effectuation of the purposes of the landmarks law and would have a harmful effect on the Terminal. (R 2242-55). The Commission refused to issue the necessary certification, thus precluding Penn Central from constructing its proposed addition.

Penn Central did not administratively appeal the Landmarks Preservation Commission's action. Instead, it initiated this lawsuit, claiming that the landmarks law is unconstitutional on its face and as applied, and seeking compensation for a "taking" of its property.

The New York Supreme Court, Trial Term, ruled in appellants' favor, at least in part on the theory that landmark preservation is not within the state's police power. (J.S. App. 71a)[8] The New York Supreme Court, Appellate Division, reversed and, with two dissents, concluded that landmarks preservation regulations, like other land use regulations, are an appropriate exercise of the police power. (J.S. App. 26a)

Pursuant to New York procedure, the Appellate Division also made *de novo* findings of fact, which are not challenged before this Court. The Appellate Division found, *inter alia*, that Penn Central failed to prove that it cannot obtain a reasonable return on its investment in the Grand Central Terminal, or that it has no reasonable use of its property without the construction of the proposed office tower.[9] (J.S. App. 48a-50a) Accordingly, applying traditional tests adopted by this Court, the Appellate Division found that

[8] This opinion is not officially reported but is reprinted at J.S. App. 51a-73a.

[9] The Terminal was designed as, and continues to function as, a railroad station. In addition, it has numerous shops, stores and eating facilities, from fast food operations to a well-known restaurant, the Oyster Bar. Thus, the station produces over a million dollars each year in rental income. In addition, the Penn Central has had the use of the tracks for its railway business. Moreover, the City of New York has provided tax relief amounting to some $11 million from property taxes attributable to the portion of the Terminal used for transportation purposes. (R 2088, 2090, 2213-18 (Exhibit 41) and 2225 (Exhibit T))

there has been no taking. (J.S. App. 24a-28a)[10] A unanimous New York Court of Appeals affirmed.[11]

This Court then noted probable jurisdiction.

Summary of Argument

Penn Central's argument to this Court is simple. The City of New York, through application of its landmarks law, has prevented Penn Central from constructing a 56-story office tower in the air space over the Terminal, thereby depriving Penn Central of the use of its air rights and, consequently, of considerable income. *Ipso facto,* Penn Central argues, the city's action constitutes a "taking" for which just compensation must be paid. Penn Central's claim is, in essence, that whenever a landmark statute prevents a property owner from using air space in a way which would maximize his profits, he is entitled to just compensation. (Penn Central Brief at 9-11)

Acceptance of Penn Central's claim would make historic preservation a virtual impossibility because any limitation on property use for aesthetic or historic purposes could be accomplished only by eminent domain. Indeed,

[10] The opinion of the Appellate Division is reported at 50 A.D.2d 265, 377 N.Y.S.2d 20 (1975), and is reprinted at J.S. App. 16a-50a.

[11] The Court of Appeals opinion is reported at 42 N.Y.2d 324, 397 N.Y.S.2d 914, 366 N.E.2d 1271 (1977), and is reprinted at J.S. App. 1a-15a.

under the argument urged by Penn Central, the Federal Government would be liable to every landowner in the City of Washington because, to protect the beauty of the capital, it has enacted a height limitation precluding any person from building a 56-story office tower on his property.[12] Moreover, while the present case involves a limitation imposed for landmark purposes, the logic of much of Penn Central's argument would apply equally to any land use regulation.

Penn Central's absolutist view entirely ignores the long line of cases from this Court which uniformly hold that a state may use its police power to regulate land use, and in the process limit an owner's use of his property, without exercising its powers of eminent domain. *E.g., Village of Belle Terre* v. *Boraas,* 416 U.S. 1 (1974); *Goldblatt* v. *Town of Hempstead,* 369 U.S. 590 (1962); *Queenside Hills Realty Co.* v. *Saxl,* 328 U.S. 80 (1946); *Village of Euclid* v. *Ambler Realty Co.,* 272 U.S. 365 (1926); *see Young* v. *American Mini Theatres, Inc.,* 427 U.S. 50, 73-84 (1976) (Powell, J., concurring). As this authority makes clear, no compensation is necessary provided the regulation is for a permissible public purpose, is not discriminatory and does not deprive the landowner of all reasonable use of the regulated property. The New York City landmarks law as applied to the Grand Central Terminal plainly meets these requirements.

First, historic preservation is a legitimate use of the police power. An important premise which underlies all of Penn Central's arguments is the notion that governmental regulation of land use for historic preservation purposes is in some way different from, and less justifiable than,

[12] D.C. Code § 5-405.

land use regulation for other purposes, such as zoning, fire protection and the like. Thus, without quite saying so, Penn Central assumes that the New York City landmarks law is not a proper use of the police power and must be tested as an exercise of eminent domain. There is no authority for such an assertion.

The fact that historic preservation laws are a relatively recent development does not make them beyond the use of the police power. These regulations, which are not significantly different from zoning laws, are merely another example of land use regulation. As this Court noted long ago, "problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities." *Village of Euclid* v. *Ambler Realty Co., supra,* 272 U.S. at 386-87.

Moreover, the legislature is the main guardian of public needs to be served by social legislation, and a legislative determination that the public welfare requires the use of the police power to regulate land in a particular manner is "well-nigh conclusive." *Berman* v. *Parker,* 348 U.S. 26, 32 (1954). In this case, pursuant to enabling legislation enacted by the State of New York, the New York City Council has specifically determined that the public welfare requires historic preservation, for both aesthetic and economic reasons. This judgment, in accord with that of numerous other states and municipalities, is certainly permissible.

Indeed, this Court so held in *City of New Orleans* v. *Dukes,* 427 U.S. 297 (1976). In *Dukes,* New Orleans had enacted an ordinance "'to preserve the appearance and custom valued by the [French] Quarter's residents and attractive to tourists.'" The Court concluded that the legitimacy of the use of the police power for such an ob-

jective was "obvious." 427 U.S. at 304. *See also Village of Belle Terre* v. *Boraas, supra,* 416 U.S. at 9; *Berman* v. *Parker, supra,* 348 U.S. at 33; *Roe* v. *Kansas,* 278 U.S. 191 (1929); *United States* v. *Gettysburg Electric Ry.,* 160 U.S. 668 (1896). Thus, there can be no doubt that the enactment of landmark regulations is well within the scope of a state's police power.

Second, single landmark designation is not discriminatory. Penn Central suggests that, even if limitations on development imposed by historic preservation legislation are valid for districts, legislation which designates and attempts to preserve single landmarks is discriminatory and unconstitutional. (Penn Central Brief at 23) Penn Central's argument apparently is that such designations are discriminatory because they treat the Grand Central Terminal differently from non-landmark property located nearby.

But as this Court noted in *Police Department of Chicago* v. *Mosley,* 408 U.S. 92, 95 (1972), the "crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment." Different treatment of similarly located buildings, one of which has great historical or architectural significance, and one of which has none, is precisely within the rule of *Mosley.* As previously discussed, preservation of historic buildings is a legitimate governmental goal. The differential treatment of landmarks and non-landmarks is obviously central to this goal. There is, therefore, a rational basis for the different treatment and no impermissible discrimination. *City of New Orleans* v. *Dukes, supra,* 427 U.S. at 303-04; *Queenside Hills Realty Co.* v. *Saxl, supra,* 328 U.S. at 83-85.

Third, under the standards consistently applied by this Court, there has been no taking and compensation is not required. Every regulation which prevents a landowner from making the most beneficial use of property and precludes maximizing profits deprives that owner of revenue he might have had under other circumstances. But this Court has repeatedly held that where the regulation is "otherwise a valid exercise of the . . . police [power]," no compensation need be paid unless the regulation so interferes with the property as to deprive the owner of all reasonable use. *Goldblatt* v. *Town of Hempstead, supra,* 369 U.S. at 592; *Hadacheck* v. *Sebastian,* 239 U.S. 394 (1915); *Hudson County Water Co.* v. *McCarter,* 209 U.S. 349, 355 (1908).

In the present case, the New York Supreme Court, Appellate Division, has found as a matter of fact that Penn Central failed to establish that the landmark regulation deprived it of all reasonable use of the Terminal or, indeed, limited its ability to make a reasonable return on its investment. (J.S. App. 48a-50a) Penn Central concedes that point in this Court. (Jurisdictional Statement 7, n.7) Accordingly, there has simply been no taking.[13]

---

[13] As other briefs have discussed at length, the New York Court of Appeals concluded that there was no taking because, *inter alia,* only that portion of the property value which was created by "the efforts of the property owner" need be considered. (J.S. App. 1a-2a, 9a) On the facts of this case, where the property involved is a railway station, built on a city street by special grant, subsidized for many years by property tax deductions and subject to a complicated interlocking scheme of Federal, State and local subsidies, such a rule may well be appropriate. However, Amici have not relied upon the grounds set forth by the New York Court of Appeals because they believe that the traditional analysis adhered to by this Court without exception over the past seventy-five years requires affirmance of the result reached below.

Similarly, a number of other briefs have dealt at length with issues related to the New York City transfer of development rights

Penn Central, attempting to avoid the dilemma which the lower court's findings pose, claims that its air rights have been entirely eliminated and that the making of a reasonable return on the Terminal itself is immaterial. (Penn Central Brief at 26) Air rights, however, are not separate property. Rather, it is always the case, when a landowner has built to a maximum height limitation, that his use of further air space is necessarily precluded. Similarly, a set-back or side lot regulation prevents a landowner from building on those portions of his property. Yet imposing a height limitation or requiring open space has never been thought to require compensation. Indeed, this Court faced and resolved these questions several years ago when it concluded that "the police power may limit the height of buildings, in a city, without compensation," *Hudson County Water Co.* v. *McCarter, supra,* 209 U.S. at 355, and that limiting an owner to the use of only a portion of his property is unobjectionable. *Gorieb* v. *Fox,* 274 U.S. 603 (1927).[14]

as applied to the Terminal. Amici have not discussed these rights in detail because they believe that, while the city has been generous by rewriting its laws specially to provide additional benefits to Penn Central (App. 68-69), there is no taking in the present case whether or not any transfer of development rights are provided to Penn Central. It is worth noting, however, should this Court reach the issue, that it is hardly novel to suggest, as did the New York Court of Appeals, that the transfer of development rights would themselves be full compensation to Penn Central if any compensation were due. As this Court held in the *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 150-51 (1974), a property owner may be required to accept other interests in kind, such as realty, as compensation where a taking does occur.

[14] Consequently, the various eminent domain cases cited by Penn Central throughout its brief are irrelevant. Each of those cases involved a situation where the governmental authority either appropriated property for its own use, precluded the landowner from any reasonable use of the property, or both. *See, e.g., United States* v. *Fuller,* 409 U.S. 488 (1973); *United States* v. *Causby,* 328 U.S. 256 (1946).

For all these reasons, the result reached by the New York Court of Appeals is correct and its decision should be affirmed.

ARGUMENT

I. Historic Preservation Is a Legitimate Use of the Police Power.

Over fifty years ago, in *Village of Euclid* v. *Ambler Realty Co.,* 272 U.S. 365 (1926), this Court held that a municipality could place restrictions on land use without providing compensation. The Court observed:

> "[P]roblems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive." 272 U.S. at 386-87.

The threshold question in each case is whether the particular restrictions on land use constitute a valid exercise of the police power. As the Court in *Euclid* also noted, such restrictions must be considered a valid exercise unless they are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." 272 U.S. at 395.[15]

[15] *Accord, Young* v. *American Mini Theatres, Inc.,* 427 U.S. 50, 73-74 (1976) (Powell, J., concurring); *Goldblatt* v. *Town of Hempstead,* 369 U.S. 590, 594-95 (1962); *Gorieb* v. *Fox,* 274 U.S. 603, 610 (1927).

This Court, as well as several state and federal courts, Congress and numerous state and municipal legislative bodies, has concluded that the preservation of historic sites and districts substantially promotes the general welfare of the public. Consequently, historic preservation, as embodied in New York's Landmarks Preservation Law, is a valid exercise of the police power.[16]

A. *The State Authorities' Conclusion that Historic Preservation Promotes the General Welfare Is Virtually Conclusive.*

This Court has repeatedly noted that the police power "embraces an almost infinite variety of subjects," [17] and that it extends to all matters of public concern. *Day-Brite Lighting, Inc.* v. *Missouri,* 342 U.S. 421, 424 (1952). For example, in *Queenside Hills Realty Co.* v. *Saxl,* 328 U.S. 80 (1946), the Court pointed out that:

> "Many types of social legislation diminish the value of the property which is regulated . . . . But in no

[16] Penn Central does not consider the question of whether landmark preservation laws are a legitimate use of a state's police power. Rather, stating that "this is not a zoning case," Penn Central simply ignores *Euclid* and assumes that the police power is unavailable. (Penn Central Brief at 20-23)

Penn Central wholly misconceives the nature and purpose of landmark preservation laws. *See* pages 25-26 *infra.* In any case, these supposed distinctions are irrelevant. The threshold question before this Court is not whether landmark preservation laws resemble other valid exercises of the police power. Rather, it is whether such laws are themselves a valid exercise of this power. *See* Costonis, *The Disparity Issue: A Context for the Grand Central Terminal Decision,* 91 Harv. L. Rev. 402, 415 (1977). Zoning ordinances, for example, are different than regulations which preserve the nation's natural resources. Yet, such regulations are as valid an exercise of the police power as zoning ordinances. *See Walls* v. *Midland Carbon Co.,* 254 U.S. 300, 324 (1920) (natural gas). *See also* note 28 *infra.*

[17] *E.g., Universal Interpretive Shuttle Corp.* v. *Washington Metropolitan Area Transit Commission,* 393 U.S. 186, 192 n.5 (1968); *Munn* v. *Illinois,* 94 U.S. 113, 145 (1877).

> case does the owner of property acquire immunity against exercise of the police power because he constructed it in full compliance with the existing laws . . . . The police power is one of the least limitable of governmental powers, and in its operation often cuts down property rights." 328 U.S. at 83.[18]

And in *Moore* v. *City of East Cleveland,* 431 U.S. 494, 498 n.6 (1977), Justice Powell noted that: "[C]ases [subsequent to *Village of Euclid* v. *Ambler Realty Co., supra*] have emphasized that the general welfare is not to be narrowly understood; it embraces a broad range of governmental purposes." *See also Consolidated Rock Products Co.* v. *City of Los Angeles,* 57 Cal. 2d 515, 20 Cal. Rptr. 638, 370 P.2d 342, *appeal dismissed,* 371 U.S. 36 (1962).

The primary responsibility for determining which measures will promote the public welfare lies with the state, and substantial deference must be paid to the state's judgment. "[T]he settled rule of this court is that it will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question." *Zahn* v. *Board of Public Works,* 274 U.S. 325, 328 (1927).[19] In fact, as long as the legislative determination

[18] The fact that Penn Central acquired its air rights in Grand Central Terminal prior to the enactment of the Landmarks Preservation Law is, of course, irrelevant. As this Court concluded in *Fleming* v. *Rhodes,* 331 U.S. 100, 107 (1947), "regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution. So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it."

[19] "The statement of the rule in *Zahn* remains viable today." *Moore* v. *City of East Cleveland, supra,* 431 U.S. at 514 n.1 (Stevens, J., concurring). *See also Powell* v. *Pennsylvania,* 127 U.S. 678, 685 (1888) (legislature has wide power to determine what the public welfare demands). In *Gorieb* v. *Fox, supra,* the Court,

is "fairly debatable the legislative judgment must be allowed to control." *Village of Euclid* v. *Ambler Realty Co., supra,* 272 U.S. at 388.[20] The state's legislative declaration of what the public interest requires is, in short, "well-nigh conclusive." *Berman* v. *Parker,* 348 U.S. 26, 32 (1954).[21]

The landmarks law at issue here was passed under the New York State Historic Preservation Enabling Act of 1956.[22] The State law declared the preservation of landmarks to be public policy of the state, and granted municipalities the authority to use the police power to provide for the protection and preservation of buildings and places of "special historical or aesthetic interest or value." When the City of New York enacted its landmarks law, it determined specifically that historic preservation was within its police power, declaring that the landmarks law was "required in the interest of the health, prosperity, safety and welfare of the people." N.Y.C. Administrative Code § 205-1.0b. (J.S. App. 76a)[23]

In sustaining the landmarks law, the New York Supreme Court, Appellate Division, concluded that the law served the economic and aesthetic purposes set forth above. (J.S. App. 18a, 23a-24a) Indeed, the court specifically found that the "preservation of landmarks in urban areas is of special importance" and that the "need to preserve structures worthy of landmark status is beyond dispute." (J.S. App. 47a)

The New York City legislative and judicial authorities are not alone in their judgment that historic preservation promotes the general welfare of the public. As the Fifth Circuit observed in *Maher* v. *City of New Orleans,* 516 F.2d 1051 (5th Cir. 1975), *cert. denied,* 426 U.S. 905 (1976):

---

referring specifically to land use restrictions and the *Village of Euclid* decision, explained:

> "State legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character and degree of regulation which these new and perplexing conditions require; and their conclusions should not be disturbed by the courts unless clearly arbitrary and unreasonable." 274 U.S. at 608.

[20] *See also Goldblatt* v. *Town of Hempstead, supra,* 369 U.S. at 595, *quoting Sproles* v. *Binford,* 286 U.S. 374, 388 (1932) ("debatable questions as to reasonableness are not for the courts but for the legislature . . .").

[21] This same deference must be paid to the determinations of the state courts. For example, in *Welch* v. *Swasey,* 214 U.S. 91 (1909), the appellant attacked an ordinance which limited the height of buildings in certain areas of Boston. The Massachusetts courts upheld the ordinance as a valid exercise of the police power and this Court affirmed, noting that whether the ordinance will "promote the general and public welfare . . . [is a matter] which the state court is familiar with, but a like familiarity cannot be ascribed to this Court." 214 U.S. at 105. Consequently, the Court concluded it has

> "the greatest reluctance in interfering with the well-considered judgments of the courts of a State whose people are to be affected by the operation of the law. . . . [The State court determination] will only be interfered with . . . where the decision is, in our judgment, plainly wrong." 214 U.S. at 106.

[22] N.Y. Sess. Laws ch. 216 (McKinney 1956), *amended and reenacted as* N.Y. Gen. Mun. Law § 96a (McKinney Supp. 1974-75).

[23] This general declaration is followed by a more explicit statement of the purposes which the law was designed to foster. According to the City Council, the law is intended to "effect and accomplish the protection, enhancement and perpetuation of . . . improvements and landscape features and of . . . districts which represent or reflect elements of the city's cultural, social, economic, political and architectural history;" "safeguard the city's historic, aesthetic and cultural heritage;" "stabilize and improve property values;" "foster civic pride in the beauty and noble accomplishments of the past;" "protect and enhance the city's attractions to tourists and visitors and the support and stimulus to business and industry thereby provided;" "strengthen the economy of the city;" and "promote the use of historic districts, landmarks, interior landmarks and scenic landmarks for the education, pleasure and welfare of the people of the city." N.Y.C. Administrative Code § 205-1.0b. (J.S. App. 76a)

> "Throughout the country, there appears to be a burgeoning awareness that our heritage and culture are treasured national assets. Many locales endowed with historic sites have enacted protective measures for them." 516 F.2d at 1060.

In fact, as previously noted, all fifty states and over five hundred municipalities have enacted historic preservation statutes or ordinances in one form or another.[24] And, as discussed below, the state courts have uniformly concluded that historic preservation is a legitimate exercise of the police power. *See* page 22 *infra*.

The Federal Government has likewise recognized that the preservation of landmarks and other historical sites is a matter of vital public importance. The executive agencies of the Federal Government have been directed by presidential order to consider landmark preservation in effecting their responsibilities. *See* Executive Order No. 11593, *Protection and Enhancement of the Cultural Environment*, 3 C.F.R. § 154.[25] Moreover, when Congress enacted the National Historic Preservation Act of 1966, 16 U.S.C. § 470,[26] it declared

[24] *See* National Trust for Historic Preservation, A Guide to State Historic Preservation Programs (1976). A number of state statutes and municipal ordinances are cited in the Jurisdictional Statement at 9, n.9. *See also* note 2 *supra*.

[25] Executive Order No. 11593 provides in part:

> "The Federal Government shall provide leadership in preserving, restoring and maintaining the historic and cultural environment of the Nation. Agencies of the executive branch of the Government . . . shall . . . in consultation with the Advisory Council on Historic Preservation . . . institute procedures to assure that Federal plans and programs contribute to the preservation and enhancement of non-federally owned sites, structures and objects of historical, architectural or archaeological significance."

[26] *See also* 42 U.S.C. § 1460(b) (federal support for local historic preservation in urban renewal programs); Historical and Archeological Sites Preservation Act of 1974, 16 U.S.C. § 469; Amtrak Improvement Act of 1974, 49 U.S.C. § 1653 (specifically encouraging the preservation of railway terminals).

> "that the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people . . . ." [27]

It is thus plain that legislative and judicial authorities, at both the federal and state levels, have uniformly concluded that the police powers may properly be used for historic preservation purposes. And, as this Court has consistently held, substantial deference must be accorded these determinations.

B. *The Decisions of this Court Make It Clear that Historic Preservation Promotes the General Welfare.*

The decisions of this Court make it clear that historic preservation promotes the general welfare of the public and is thus a legitimate use of the police power. If there were any doubt about the matter, it was resolved recently in *City of New Orleans* v. *Dukes*, 427 U.S. 297 (1976). There, a New Orleans ordinance barred most pushcart vendors from the historic French Quarter. The purpose of the ordinance was "'to preserve the appearance and custom valued by the Quarter's residents and attractive to tourists.'" The Court concluded that the propriety of the use of the police power to further such an objective was "obvious." 427 U.S. at 304.

The result in *Dukes* was foreshadowed by the decisions in *United States* v. *Gettysburg Electric Ry.*, 160 U.S. 668

[27] 16 U.S.C. § 470(b). Pursuant to this Act, an Advisory Council on Historic Preservation was established, and a National Register of Historic Places developed. The Grand Central Terminal was placed on the Register on January 17, 1975.

(1896), and *Roe* v. *Kansas,* 278 U.S. 191 (1929). In each case, the Court sustained the government's authority to condemn particular historic property, concluding that such action was "closely connected with the welfare of the republic itself . . . ." 160 U.S. at 682. While these cases involved eminent domain, the concept of public welfare does not vary depending upon the manner in which the government chooses to preserve the landmark. This was made clear in *Berman* v. *Parker,* 348 U.S. 26 (1954), where the Court used the public welfare concept, interchangeably, in its police power and eminent domain discussions.

Moreover, the Court has consistently held that those values promoted by historic preservation, *see* note 23 *supra,* are within the public welfare. As long ago as *Welch* v. *Swasey, supra,* the Court, in sustaining Boston's ordinance limiting building heights, held that it was appropriate to regulate property for aesthetic, as well as safety, purposes. 214 U.S. at 108. And, in *Village of Belle Terre* v. *Boraas,* 416 U.S. 1 (1974), the Court sustained an ordinance which restricted land use to "one-family" dwellings. The Court concluded that "'property rights may be cut down, and to that extent taken, without pay'" where the considerations involved are "family values, youth values, and the blessings of quiet seclusion and clean air. . . ." 416 U.S. at 9-10. In reaching this conclusion, the Court relied upon *Berman* v. *Parker, supra,* where it was held:

> "The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." 348 U.S. at 33.

See also Paris Adult Theatre I v. *Slaton,* 413 U.S. 49, 57-58, 62 (1973) ("there are legitimate state interests . . . in the quality of life and the total community environment"; legislative directive valid notwithstanding claim that it involved "imponderable aesthetic assumptions"); *Young* v. *American Mini Theatres, Inc., supra,* 427 U.S. at 73-84 (1976) (Powell, J., concurring).[28]

---

[28] The Real Estate Board of New York, in its amicus curiae brief (at 21-26), agrees that the police power extends to the protection of aesthetic interests. It suggests, however, that the police power is at a "greatly reduced level" where considerations of "aesthetic appearance or historic places" are involved. This is so, argues the Board, because aesthetic matters "involve considerations of subjective judgment and taste." The Board cites no authority, and Amici are aware of none, sustaining that proposition. Indeed, over a century ago in the *License Cases,* 46 U.S. (5 How.) 504, 583 (1847), where the concept of police power was first explicated, the Court indicated the exact opposite:

> "[The police powers] are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a State passes a quarantine law, or a law to punish offences, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, *in every case it exercises the same power;* that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion. . . . [I]ts authority to make regulations of commerce is as absolute as its power to pass health laws, except in so far as it has been restricted by the constitution of the United States." (Taney, C.J., concurring) (Emphasis supplied).

If anything, where subjective judgments are involved, legislative determinations of the propriety of the use of the police power are given particular deference. *See Paris Adult Theatre I* v. *Slaton, supra,* 413 U.S. at 62; *Young* v. *American Mini Theatres, Inc., supra,* 427 U.S. at 71 (1976) (opinion of Stevens, J.) (the "city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect"); *id.* at 80 (Powell, J., concurring) (it is "undeniable that zoning, when used to preserve the character of specific areas of a city, is perhaps 'the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life.'"). *See also* note 16 *supra.*

Relying in part upon the above-cited authority the courts have uniformly concluded that historic preservation is a legitimate exercise of the police power. For example, in *Figarsky* v. *Historic District Commission,* 171 Conn. 198, 368 A.2d 163 (1976), the court upheld a municipal historic district ordinance, noting:

> "In a number of recent cases, it has been held that the preservation of a historical area or landmark as it was in the past falls within the meaning of general welfare and, consequently, the police power." 171 Conn. at , 368 A.2d at 170.

And in *Maher* v. *City of New Orleans, supra,* the Fifth Circuit similarly observed that there exists "substantial [judicial] support . . . for a legislative determination to preserve historic landmarks and districts." 516 F.2d at 1059.[29]

In short, historic preservation promotes the general welfare and is thus a legitimate exercise of the police power. Accordingly, the impact of New York City's landmarks law upon the Grand Central terminal must be analyzed, not as an exercise of eminent domain, but under the tests applied to valid exercises of the police power, such as zoning and other land use regulations.

---

[29] *E.g., Lafayette Park Baptist Church* v. *Scott,* 553 S.W.2d 856 (Mo. Ct. App. 1977); *Bohannan* v. *City of San Diego,* 30 Cal. App. 3d 416, 106 Cal. Rptr. 333 (1973); *Rebman* v. *City of Springfield,* 111 Ill. App.2d 430, 250 N.E.2d 282 (1969); *Manhattan Club* v. *Landmarks Preservation Comm'n,* 51 Misc. 2d 556, 273 N.Y.S. 2d 848 (1966); *Town of Deering ex rel. Bittenbender* v. *Tibbetts,* 104 N.H. 481, 202 A.2d 232 (1964); *Vieux Carre Property Owners & Assoc., Inc.* v. *City of New Orleans,* 246 La. 788, 167 So.2d 367 (1964); *City of Santa Fe* v. *Gamble-Skogmo, Inc.,* 73 N.M. 410, 389 P.2d 13 (1964); *Opinion of the Justices to the Senate,* 333 Mass. 783, 128 N.E.2d 563 (1955); *Opinion of the Justices to the Senate,* 333 Mass. 773, 128 N.E.2d 557 (1955).

II. Regulation of Individual Landmarks Is Not Discriminatory.

Where regulatory legislation involves economic and social issues, different treatment of persons or property is entirely permissible if there is some rational basis for distinction.[30] As this Court said in *Village of Belle Terre* v. *Boraas, supra*:

> "We deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of . . . [discrimination if the law] bears 'a rational relationship to a [permissible] state objective.'" 416 U.S. at 8.

Thus, all that is required to sustain a regulation such as New York City's landmarks law against a charge of discrimination is that there be an "appropriate governmental interest suitably furthered by the differential treatment." *Police Dep't of Chicago* v. *Mosley,* 408 U.S. 92, 95 (1972); *Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415 (1920). *See also Morey* v. *Doud,* 354 U.S. 457, 463-64 (1957).

It seems clear that differential treatment of similarly located buildings, one of which has great historical or architectural significance and one of which has none, is rationally related to the city's legitimate plan[31] to protect structures of particular historic or aesthetic merit. Consequently, the different treatment of landmarks and

---

[30] There is no claim in the present case that the regulation involves any invidious classification, such as race, or impacts upon any specially protected right, such as freedom of speech. Accordingly, claims of discrimination in this instance are subject to the rational basis test. *City of New Orleans* v. *Dukes, supra,* 427 U.S. at 303; *Village of Belle Terre* v. *Boraas, supra,* 416 U.S. at 7.

[31] As discussed above, the preservation of sites of historic and aesthetic merit is a legitimate governmental interest.

non-landmarks has a reasonable basis and is perfectly acceptable. *United States Dep't of Agriculture* v. *Moreno,* 413 U.S. 528, 533 (1973); *Dandridge* v. *Williams,* 397 U.S. 471, 485-86 (1970).

Nevertheless, Penn Central claims that the application of New York City's landmarks law to the Grand Central Terminal should be struck down as discriminatory.[32] In support of this proposition, Penn Central makes several claims, each of which is both without factual basis and incorrect as a matter of law.

First, quoting from a portion of the New York Court of Appeals decision, Penn Central claims that subjecting the Grand Central Terminal to more rigorous restrictions than nearby non-landmark properties is tantamount to "'discriminatory' zoning restrictions, properly condemned, affecting properties singled out in a zoning district for more restrictive or more liberal zoning limitations." (Penn Central Brief at 23) But, as the New York Court of Appeals observed in the remainder of the paragraph, which Penn Central omitted from its brief:

> "There is, however, a significant difference. Discriminatory zoning is condemned because there is no acceptable reason for singling out one particular parcel for different and less favorable treatment. When landmark regulation is involved, there is such a reason: the cultural, architectural, historical, or social significance attached to the affected parcel." (J.S. App. 6a)

This Court has already recognized that a city can reasonably make distinctions based upon architectural ap-

[32] While Penn Central refers to the ordinance as "discriminatory," and argues that the law should therefore be held unconstitutional, it never explicitly makes an argument in terms of the Equal Protection Clause of the Fourteenth Amendment. (Penn Central Brief at 23)

pearance, charm and beauty, and historic merit of buildings and areas. *City of New Orleans* v. *Dukes, supra,* 427 U.S. at 303-04. *See also Queenside Hills Realty Co.* v. *Saxl, supra* (upholding restrictions imposed on buildings constructed prior to 1944). That is precisely what is done under the New York City landmarks law.

Second, Penn Central claims that the landmarks law is discriminatory because the designation of individual landmarks, such as the Terminal, is not part of a comprehensive plan. (Penn Central Brief at 23) In fact, the New York City landmarks laws is a part of the City's general urban planning and land use regulations.[33] As one commentator explained, New York City's landmarks program is simply "a component of . . . a [general community plan] one of whose goals includes the maintenance of the desirable features of the existing urban fabric." J. Costonis, *The Disparity Issue: A Context for the Grand Central Termi-*

[33] The landmark process has been established in conjunction with New York City's zoning regulations, as Penn Central has recognized by advising this Court that both the landmarks law and the zoning regulations are affected by this litigation. (Penn Central Brief at 2) Indeed, the landmark designation process goes through a review and comment procedure that is designed to make landmark regulations a part of the City's general land use regulations. Thus, while the landmarks law was being prepared and considered by the city government, the staff of the Landmarks Preservation Commission surveyed the entire city for over two years to identify landmarks. The Commission held an initial series of public hearings over an eighteen-month period at which proposed landmarks and historic districts were considered. After the hearings and further study of the buildings, landmarks and historic districts were designated by the Commission and these designations sent to the Board of Estimate for approval. Before acting, the Board received from the City Planning Commission a report on each designation and its relation "to the master plan, the zoning resolution, projected public improvements and any plans for the renewal of the area involved." N.Y.C. Administrative Code § 207-2.0 g (1). (J.S. App. 85a) *See* Loflin, *Zoning and Historic Districts in New York City,* 36 Law and Contemp. Prob. 363, 365 (1971).

nal Decision, 91 Harv. L. Rev. 402, 415 (1977). And while it is one of the three or four most important buildings in New York, the Grand Central Terminal has not been singled out for designation as a landmark. Rather, as previously noted, New York has designated 31 historic districts and some 500 individual landmarks. *See* page 4 *supra.*

More importantly, there is no principle which requires that to be valid a legislative enactment must be pursuant to a comprehensive plan. On the contrary, this Court has uniformly held that:

> "Legislatures may implement their program step by step, . . . in such economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations." *City of New Orleans* v. *Dukes, supra,* 427 U.S. at 303.

See also Katzenbach v. *Morgan,* 384 U.S. 641, 657 (1966); *Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 488-89 (1955).[34]

Finally, Penn Central argues that, unlike other land use regulations that have been held to be non-discriminatory, the burden of the landmark regulations in this case is borne entirely by Penn Central, which receives no benefit from the preservation of the Terminal. (Penn Central Brief at 23) This is simply wrong as a factual matter. Penn Central obtains the same benefits from preservation of the Terminal as do the city's other citizens—the protection of the city's

[34] In *Hadacheck* v. *Sebastian,* 239 U.S. 394 (1915), this Court concluded:

> "It may be that brick yards in other localities within the city where the same conditions exist are not regulated or prohibited, but it does not follow that they will not be. That petitioner's business was first in time to be prohibited does not make its prohibition unlawful." 239 U.S. at 413.

appearance, charm and beauty and economy, which the city properly determined to be of prime importance in passing the landmarks law. *City of New Orleans* v. *Dukes, supra,* 427 U.S. at 303-04. And Penn Central receives unique benefits as well, transferable development rights[35] and the modification of normal use restrictions.[36]

Furthermore, as a legal matter, Penn Central's entire benefits and burdens argument simply has no place in a determination of whether the landmarks law is discriminatory. For example, in *City of New Orleans* v. *Dukes, supra,* this Court sustained a New Orleans city ordinance which, in order to protect the historic and aesthetic qualities of the French Quarter, and to protect the city's economy and tourist industry, prohibited pushcart vendors from operating in the Quarter. Two of the three vendors previously operating in the area were exempted from the operation of the ordinance by a grandfather clause. Obviously, the burden of the ordinance fell entirely on Dukes, the vendor who was driven out of business, and the benefits flowed to the population of the city as a whole. This Court, however, unanimously upheld the ordinance against a claim of discrimina-

[35] It is undisputed that because of the Terminal's status as a landmark, Penn Central has certain transferable development rights not applicable to non-landmark properties. (J.S. App. 11a-14a, 113a-18a) Penn Central claims that these rights are "uncertain" and "speculative," but does not argue that they are worthless. (Penn Central Brief at 38) The city says that these rights are worth millions of dollars, and points to the fact that Penn Central was offered $3.5 million in 1971 in each of two separate bids by appellant UGP for the air rights. (Motion to Dismiss 27, App. 47-49) Other evidence demonstrates a significant rental value for these rights. (App. 80-82) Whatever the merit of the parties' respective positions on this point, it seems apparent that the transferable development rights have some value and hence are a benefit to Penn Central to at least some extent. The New York Court of Appeals so held. (J.S. App. 11a-13a)

[36] Uses may be permitted in a designated landmark that are not allowed in adjacent, non-landmark buildings. N.Y.C. Zoning Resolution § 74-711.

tion by Dukes, without so much as considering who was burdened and who was benefited. To the same effect is *Goldblatt* v. *Town of Hempstead, supra,* in which this Court upheld a zoning ordinance that was designed to and did prohibit the operation of a quarry, although it was obvious that the burden of the ordinance fell entirely upon the quarry owner and the benefits flowed to the town's entire populace.

In sum, nondiscrimination in the context of the present regulation means only that the distinctions drawn between properties must be rationally related to the furtherance of a legitimate state purpose. *City of New Orleans* v. *Dukes, supra; Village of Belle Terre* v. *Boraas, supra.* The designation and preservation of single landmarks is directly and obviously related to the legitimate goals established by the city in its historic preservation law. Accordingly, the application of the law to single landmarks such as Grand Central Terminal is not discriminatory.

III. There Has Been No Taking in This Case.

The previous sections of this brief have demonstrated that New York City's landmarks law is a proper exercise of the police power and that its application to individual landmarks is not discriminatory. The sole remaining question, then, is whether application of the regulation to the Grand Central Terminal amounts to a taking for which compensation is required. Since Penn Central may make reasonable use of the Terminal, no such taking has occurred.

This Court long ago held that:

> "A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking

> or an appropriation of property for the public benefit. . . . The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain . . . ." *Mugler* v. *Kansas,* 123 U.S. 623, 668-69 (1887), quoted with approval in *Goldblatt* v. *Town of Hempstead, supra,* 369 U.S. at 593.

The rule has developed in this Court and elsewhere that a valid regulatory scheme pursuant to the police power does not amount to a taking unless the owner is left with no reasonable use of his property. *Hadacheck* v. *Sebastian, supra; Hudson County Water Co.* v. *McCarter, supra,* 209 U.S. at 355 (Holmes, J.); *Maher* v. *City of New Orleans, supra,* 516 F.2d at 1066; *C.F. Lytle Co.* v. *Clark,* 491 F.2d 834, 838 (10th Cir. 1974); *Steel Hill Development, Inc.* v. *Town of Sanbornton,* 469 F.2d 956, 963 (1st Cir. 1972); *Pope* v. *City of Atlanta,* 418 F. Supp. 665, 669 (N.D. Ga. 1976). *See also City of Eastlake* v. *Forest City Enterprises, Inc.,* 426 U.S. 668, 674 n.8 (1976); *HFH, Ltd.* v. *Superior Court,* 15 Cal. 3d 508, 125 Cal. Rptr. 365, 542 P.2d 237 (1975).[37]

Thus, in *Village of Euclid* v. *Ambler Realty Co., supra,* 272 U.S. at 384, this Court sustained, as a reasonable exercise of the police power not requiring compensation, a zon-

---

[37] As the First Circuit concluded in *South Terminal Corp.* v. *Environmental Protection Agency,* 504 F.2d 646 (1974):

> "Three situations must be distinguished. First, a particular use of a parcel of property may be regulated or forbidden. Second, all uses of a parcel may be forbidden. Third, a right to use or burden property in a particular and permitted way may be transferred from the original owner to another person, or to a governmental body. Only the second and third situations are thought of as takings today." 504 F.2d at 679.

ing ordinance which reduced plaintiff's property value by 75%. And in *Hadacheck* v. *Sebastian, supra,* 239 U.S. at 405, this Court approved a limitation, without compensation, which reduced the value of the property over 90%. "The cases are legion that sustained zoning against claims of serious economic damage." *Young* v. *American Mini Theatres, Inc., supra,* 427 U.S. at 78 (Powell, J., concurring). *See also Zahn* v. *Board of Public Works, supra,* 274 U.S. at 327 (fact that without restrictive zoning market value of property would be "greatly enhanced" does not make zoning ordinance a taking).

More recently, this Court in *Goldblatt* v. *Town of Hempstead, supra,* cited the *Hadacheck* case with approval in upholding an ordinance which precluded a quarry owner from continuing his business. The Court noted that:

> "Concededly the ordinance completely prohibits a beneficial use to which the property has previously been devoted. However, such a characterization does not tell us whether or not the ordinance is unconstitutional. It is an oft-repeated truism that every regulation necessarily speaks as a prohibition. If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional." 369 U.S. at 592.

In the present case, the New York Supreme Court, Appellate Division, found as a factual matter that the landmark designation and the refusal to permit construction of the office tower in no way interfered with the Terminal's continued use. The court also found that Penn Central had not proven under the traditional taking tests that the use of its property was unreasonably limited or that it could not earn a reasonable return on its investment. (J.S. App. 48a-50a) Penn Central admits that these findings are final

and not disputed in this Court. (Jurisdictional Statement 7, n.7) Under the authorities cited above, these factual findings conclusively establish that there has been no taking and that no compensation need be paid.

Penn Central attempts to avoid the lower court's findings by claiming that its air rights over the Terminal have been entirely eliminated. Penn Central then cites a series of eminent domain cases, such as *Griggs* v. *Allegheny County,* 369 U.S. 84 (1962), and *United States* v. *Causby,* 328 U.S. 256 (1946), for the proposition that it must be compensated for this "taking" of its air rights. (Penn Central Brief at 25-26)

But these cases are plainly irrelevant in the present situation. First, in *Griggs* and *Causby* the governmental authority appropriated to its own *use* the space above plaintiff's property for the transit of aircraft. Second, in those cases there was a clear interference with the pre-existing use of the property—that is, the noise and vibration from low-flying aircraft made the existing habitation and conduct of business on the property impossible. *Griggs* v. *Allegheny County, supra,* 369 U.S. at 86-87; *United States* v. *Causby, supra,* 328 U.S. at 259, 262 n.7.[38]

The City of New York's regulations do not prohibit Penn Central's use of the Terminal, nor has the City built its own office building in the air space over the Terminal. Rather, a limitation on the use of air rights by the Penn Central has been imposed absent both interference with

---

[38] For the same reasons, the other cases relied upon by Penn Central are inapposite to this case. For example, *United States* v. *Fuller,* 409 U.S. 488 (1973), involved a condemnation of more than nine hundred acres of land by the Government, which not only prevented the former owner from continuing to use the land, but took the right and title to the land for itself. 409 U.S. at 489.

the property below and the physical use of the air rights by the Government.

Whenever a landowner has previously built to a maximum height limitation, the further use of air space is necessarily precluded. If, as Penn Central claims, air rights are to be treated as separate property and their elimination is automatically a taking, there can be no valid height limitations. That notion, however, was rejected by this Court more than 70 years ago when it concluded that "the police power may limit the height of buildings, in a city, without compensation . . . [so long as it does not make the] building lot wholly useless." *Hudson County Water Co.* v. *McCarter, supra,* 209 U.S. at 355. Indeed, that was the precise holding of this Court in *Welch* v. *Swasey, supra,* where the City of Boston's height limitations were sustained as a reasonable exercise of the police power against a challenge virtually identical to that advanced by Penn Central.

The difficulty with Penn Central's argument is its insistence that a property owner has the absolute right to use every inch of his property and that any limitation of that right is a taking. This Court held otherwise in upholding the validity of setback regulations which required an owner to leave a portion of his property unbuilt:

> "The remaining contention is that the ordinance, by compelling petitioner to set his building back from the street line of his lot, deprives him of his property without due process of law. . . . It is hard to see any controlling difference between regulations which require the lot-owner to leave open areas at the sides and rear of his house and limit the extent of his use of the space above his lot and a regulation which requires him to set his building a reasonable distance back from the street. Each interferes in the same way, if not the same extent, with the owner's general

> right of dominion over his property. All rest for their justification upon the same reasons which have arisen in recent times as a result of the great increase and concentration of population in urban communities and the vast changes in the extent and complexity of the problems of modern city life." *Gorieb* v. *Fox, supra,* 274 U.S. at 608.

These principles have been repeatedly applied by the lower courts in historic preservation and similar cases. Thus, in *Maher* v. *City of New Orleans, supra,* the Fifth Circuit sustained the New Orleans French Quarter preservation ordinance against a challenge by a landowner who had been refused permission to demolish a small cottage to erect an apartment building. Because the owner failed to demonstrate that he could make no reasonable use of the cottage, the court found that the ordinance as applied did not constitute a taking. 516 F.2d at 1066.[39]

Particularly illustrative of the defects of Penn Central's argument is *Benenson* v. *United States,* 548 F.2d 939 (Ct. Cl. 1977). *Benenson* involved restrictions by the United States under the Pennsylvania Avenue Development Corporation Act which prohibited the owners of the Willard

---

[39] *See also Construction Industry Association* v. *City of Petaluma,* 522 F.2d 897 (9th Cir. 1975), *cert. denied,* 424 U.S. 934 (1976) (zoning plan which precluded any development of certain properties for a period of time held not a taking); *City of St. Paul* v. *Chicago, St. Paul, Minneapolis and Omaha Ry.,* 413 F.2d 762 (8th Cir.), *cert. denied,* 396 U.S. 985 (1969) (ordinance imposing special height restrictions on property owned by the railroad in order to preserve the view from a city park and from downtown areas behind the park held permissible under the police power); *Moviematic Indus., Corp.* v. *Board of County Commissioners,* 349 So.2d 667, 670-71 (Fla. App. Ct. 1977); *Figarsky* v. *Historic District Commission,* 171 Conn. 198, 368 A.2d 163, 171-72 (1976); *First Presbyterian Church* v. *City Council,* 360 A.2d 257, 261 (Pa. Commonwealth 1976); *Candlestick Properties, Inc.* v. *San Francisco Bay Conservation and Development Commission,* 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (1970).

Hotel in Washington from demolishing the building. Because the Willard had been gutted and could neither be used in its existing condition nor economically renovated, the effect of the regulation was to prohibit any use of the property. 548 F.2d at 947-48. Accordingly, the Court held that a taking had occurred. Of course, it is precisely this factual showing that the New York courts found that Penn Central did not make.

Thus, there is simply no taking in the present case.

• • •

The rule that regulatory legislative schemes grounded in the public health, safety and welfare do not require compensation in the absence of the elimination of all reasonable use of a property is based on the rule of necessity. As this Court has recognized, if every such regulatory plan which diminished the value of an owner's property required compensation, the Federal, State and local governments would be powerless to regulate property and land use regulation would be impossible. *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393, 413 (1922); *Hudson County Water Co.* v. *McCarter, supra,* 209 U.S. at 355. *See also* Note, *Use of Zoning Restrictions to Restrain Property Owners from Altering or Destroying Historic Landmarks,* 1975 Duke L.J. 999, 1019.

The same is true in the field of historic preservation. The result sought by Penn Central would, in essence, find a taking and require compensation for every property owner whose maximum potential use of his property was limited by a landmarks law. Such a rule would treat historic preservation differently from every other type of land use regulation and would, as a practical matter, eliminate historic preservation in this country. Thus, the result urged by Penn Central is not only contrary to an

unbroken line of decisions by this Court, contrary to the determination of the public welfare by the legislatures of every State and the municipal authorities of some five hundred cities and towns, but contrary to common sense and the common weal.

CONCLUSION

For the foregoing reasons, Amici urge this Court to affirm the decision of the Court of Appeals of the State of New York.

Respectfully submitted,

David Bonderman
Robert A. Garrett
Arnold & Porter
1229 Nineteenth Street, N.W.
Washington, D.C. 20036
Attorneys for Amici Curiae

Of Counsel:

Frank B. Gilbert
Stephen N. Dennis
Gregory E. Andrews
740-48 Jackson Place, N.W.
Washington, D.C. 20006

March, 1978